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# In the Supreme Court of the United States

OCTOBER TERM, 1990

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SONICRAFT, INC., PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

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## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the National Labor Relations Board acted within its discretion in amending an unfair labor practice complaint to include an allegation of discriminatory mass layoff that was closely related to a pending, timely filed unfair labor practice charge alleging discriminatory recall from that mass layoff.

2. Whether the Board, having determined that union activity was a motivating factor in petitioner's decision to lay off over half of the unit employees, properly applied the burden of proof allocation approved in *NLRB* v. *Transportation Management Corp.*, 462 U.S. 393 (1983).

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 905 F.2d 146. The supplemental decision and order of the National Labor Relations Board (Pet. App. 10a-15a), the supplemental decision of the administrative law judge (Pet. App. 16a-41a), and the initial decision of the administrative law judge (Pet. App. 45a-113a), are reported at 295 N.L.R.B. No. 78.

## JURISDICTION

The judgment of the court of appeals (Pet. App. 8a-9a) was entered on June 12, 1990. The petition for a writ of certiorari was filed on September 10,

1990. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. In August 1981, Warehouse, Mail Order, Office, Technical and Professional Employees Union Local 743, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the Union) began an organizing campaign among petitioner's production, maintenance, and warehouse employees. Pet. App. 54a. Petitioner's management, beginning in September 1981, responded to the organizational campaign by coercively interrogating the employees, creating the impression that their activities were under surveillance, and threatening that unionization could result in job loss. *Id.* at 57a-58a, 60a, 62a-63a, 65a-66a, 71a-78a.

On November 25, for instance, petitioner's president, Jerry Jones, gave a speech to employees expressing opposition to the Union. Pet. App. 71a. During the speech and the following question and answer session, Jones threatened employees with loss of benefits—including petitioner's practice of keeping employees at work during slow periods—if they selected the Union as their collective bargaining representative. *Id.* at 73a-74a, 77a. In early December, one of petitioner's supervisors told two employees that "if the Union did get in," Jones would "either move the company, hire new employees or lay off the employees he had" and that the employees "would be the ones to not have a pleasant Christmas and be in the unemployment line." *Id.* at 60a.

In the ensuing Board-conducted representation election, which was held on Friday, December 11, the Union won by a vote of 45 to 35. On Sunday, December 13, petitioner's supervisors notified 50 of the

92 unit employees that they had been laid off and, the next day, informed them that the layoffs were indefinite. Only one nonunit employee was laid off, and no supervisors were affected. Pet. App. 56a.

Several laid off employees were told by their supervisors that the layoffs were attributable to the Union's victory. Employee Weader Lynch was told by her supervisor that President Jones was very upset "because the union had won" and had decided that "these people [on a list of attendees at the Union victory celebration] would definitely not be coming back to work." Pet. App. 64a. Employee Mary Durham was told by a production supervisor that the employees were laid off because work was slow, "plus the Union came in." *Id.* at 66a. When employee Eva Henry was recalled to work in February 1982, she asked Supervisor Dorothy Jones whether Lynch, who was also under Jones' supervision, would be returning to work. Jones replied that Lynch "wasn't coming back" because she was on a "no-no list." When Lynch called Jones to verify the information, Jones advised that "there were two lists, one of people who would come back and one of people who would not come back." Supervisor Jones explained that President Jones' lawyer had advised petitioner not to recall Lynch "because she was a troublemaker and affiliated with the Union." Pet. App. 79a.

Within days after the layoff, petitioner began recalling employees. Seven employees were recalled in December 1981, and thirteen were recalled in February 1982. Between February 1982 and February 1983, petitioner hired ten new employees classified as "storeroom clerk" or "janitor." In February 1983, petitioner rehired three members of the Union organizing committee (Lula Armstrong, Weader Lynch,

and Alyce Seay) after requiring them to pass a test that was more difficult than the test they had taken when first hired. None of the existing employees was required to pass the test. Petitioner did not recall any other laid off employees. In March 1983, it began hiring a number of new employees for unit positions. Pet. App. 3a, 56a-57a, 81a n.12, 106a-109a.

2. a. On February 22, 1982, the Union filed a charge with the National Labor Relations Board alleging that petitioner had violated the Act by laying off employees on December 13, 1981, and refusing to recall them for discriminatory reasons; the Union also alleged that, beginning in August 1981, petitioner threatened and interrogated employees and created the impression that they were under surveillance. Pet. App. 48a; C.A. App. Exh. H. On April 29, 1982, the Regional Director dismissed the portion of the charge concerning the original layoff and issued a complaint alleging that petitioner had violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. 158(a)(3) and (1), by refusing to recall four employees who had been laid off on December 13, and had violated Section 8(a)(1) by threatening and interrogating employees, and giving them the impression that Union activities were under surveillance, both before and after the layoffs. Pet. App. 48a. See also Pet. App. 32a; C.A. App. Exh. G.[1]

b. On December 1, 1982, after the opening of the unfair labor practice hearing before an Administrative Law Judge and in response to subpoenaed evi-

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[1] The Union unsuccessfully appealed the Regional Director's partial dismissal of the charge to the General Counsel and sought reconsideration of the General Counsel's denial of its appeal. Pet. App. 48a.

dence, the General Counsel moved to amend the complaint to include the previously dismissed allegation that the layoffs were unlawful. The ALJ denied the motion, but, on December 8, the Board reversed and directed the ALJ to grant the motion to amend. In February 1983, the Board denied petitioner's motion for en banc reconsideration, but noted that the denial was without prejudice to petitioner's right to renew its contentions through the filing of an appropriate exception. Pet. App. 48a-49a.

c. The proceedings resumed, and the case was tried for 24 days between October 1982 and May 1983. Pet. App. 45a. On February 14, 1984, the ALJ issued his opinion, addressing both petitioner's renewed challenge to the amendment and the merits.[2] He reaffirmed the propriety of the amendment and rejected petitioner's contention that Section 10(b) of the Act, 29 U.S.C. 160(b), precluded the amendment. Pet. App. 51a.[3] The ALJ noted that, in *California Pacific Signs, Inc.*, 233 N.L.R.B. 450 (1977), the Board had recognized "the General Counsel's virtually unlimited discretion to proceed on [dismissed] charges after he has initially refused to issue Complaint on them." Pet. App. 52a.[4] The ALJ added

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[2] In January 1983, the case had been assigned to a different ALJ. Pet. App. 45a.

[3] Section 10(b) provides, in part, that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board * * *." 29 U.S.C. 160(b).

[4] The ALJ rejected petitioner's reliance on *Winer Motors Inc.*, 265 N.L.R.B. 1457 (1982), noting that there, in precluding the reinstatement after the six-months limitation period of a *withdrawn* charge, one concurring Board Member had specifically distinguished the case of reinstatement of a *dismissed* charge. Pet. App. 52a.

that, in the circumstances of this case, the amendment resulted in no "unfairness or lack of due process." Pet. App. 53a. Thus, "[w]hen the Complaint was amended, full opportunity was given to [petitioner] to prepare its defense and to answer the new Complaint allegations." Pet. App. 54a. Moreover, the layoff issue was "reasonably related to the recall from layoff issue in the original Complaint," and "evidence of the former was effectively intertwined with evidence of the latter." *Ibid.*

On the merits, the ALJ concluded that petitioner violated Section 8(a)(1) of the Act by coercively interrogating and threatening its employees, and by creating the impression that their union activities were under surveillance. Pet. App. 57a-80a, 109a-110a. The ALJ also found that petitioner laid off the 50 employees in reprisal for the Union's election, in violation of Section 8(a)(3) and (1) of the Act. Pet. App. 80a-94a, 110a.[5] The ALJ concluded that petitioner's discriminatory motive for the layoffs was established by (1) the fact that they were decided upon immediately after the Union won the election; (2) the violations of Section 8(a)(1) committed by petitioner's managers before the layoffs (notably President Jones' unlawful threats of loss of benefits and Supervisor Denson's threat of a layoff if the Union won); and (3) the admissions of petitioner's supervisors that it laid off employees because of the Union victory. Pet. App. 80a-81a. The ALJ rejected petitioner's contention that the layoffs were brought about because of a cash flow problem that coincided with a

[5] The ALJ further found that the Company discriminatorily selected for layoff eight named employees and refused timely to select for recall ten named employees. Pet. App. 109a.

parts shortage and over-accumulation of nearly completed products. He found that the "evidence does not show a severe problem either in inventory or in cash flow that would justify such a precipitous and far reaching layoff." Pet. App. 93a. Accordingly, he determined that petitioner "failed to prove, in response to the General Counsel's showing of discriminatory motivation, that it would have laid off indefinitely over 50 percent of its production employees in the absence of the Union's election victory on December 11." *Ibid.*

d. On March 27, 1985, the Board remanded the case to the ALJ to reconsider the amendment issue in light of *Ducane Heating Corp.*, 273 N.L.R.B. 1389 (1985), which had been decided after the ALJ's decision. Pet. App. 42a-44a. The Board noted that the ALJ had relied on *California Pacific Signs*, and that *Ducane* had overruled *California Pacific Signs*. Pet. App. 42a. In *Ducane*, the Board held that "a dismissed charge may not be reinstated outside the 6-month limitations period of Section 10(b) absent [fraudulent concealment]." 273 N.L.R.B. at 1390.[6]

e. On December 11, 1985, the ALJ concluded that *Ducane* did not preclude the amendment because the mass layoff alleged in the amendment was closely related to the timely filed charges that supported the original complaint. Pet. App. 28a-37a.[7] The ALJ explained that *Ducane* did not overrule longstanding

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[6] In *Ducane*, the Board also reversed *Winer Motors*. 273 N.L.R.B. at 1390. The Board's decision in *Ducane* was eventually enforced by the Fourth Circuit. 785 F.2d 304 (1986) (table).

[7] The ALJ pointed out that "[t]he amendment involved the layoff and refusal to recall all employees, the same discriminatory basis and section of the Act that undergirded

Board and court precedents holding that the timely filing of a charge tolls the time limitation of Section 10(b) as to matters subsequently alleged in an amended complaint " 'which are similar to, and arise out of the same course of conduct, as those alleged in the timely filed charge.' " Pet. App. 29a (quoting *Kelly-Goodwin Hardwood Co.*, 269 N.L.R.B. 33, 36-37 (1984), enforced mem., 762 F.2d 1018 (9th Cir. 1985) (Table)); Pet. App. 33a. The ALJ explained (*id.* at 34a) (citation omitted):

> There is no difference—in terms of the Section 10(b) rationale of *Ducane*—between allegations in a dismissed charge which "ceases to exist"—and allegations which were never made part of a charge. If the latter time-barred allegations can properly be amended into a case pursuant to the "closely related" doctrine—as the cases clearly hold—then the former should also be susceptible to amendment if they likewise are "closely related." The policy behind Section 10(b)—that stale allegations should not be litigated after records are lost and memories dim—applies equally to both types of cases.

As a separate ground for his conclusion, the ALJ also determined that the amendment should be permitted because petitioner had made material misrepresentations that tolled the statute of limitations. Pet. App. 18a-28a.

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the four refusals to recall that were the basis for the original Complaint. Both allegations involved the same employer and the same unit and arose out of the same campaign, which ended in a union victory in the election of 11 December. They are also closely related in time." Pet. App. 31a (footnote omitted). The ALJ also noted that the layoff allegation was related to the Section 8(a)(1) threat charges. *Id.* at 32a.

f. On June 15, 1989, the Board affirmed. Pet. App. 10a-15a. With regard to the amendment of the complaint, the Board agreed with the ALJ that the charges in the amended complaint were closely related to the timely filed charge and that the amendment should be permitted; it cited its decision in *Redd-I, Inc.*, 290 N.L.R.B. No. 140 (Sept. 16, 1988). Pet. App. 12a n.3.[8] The Board added that "[i]n the absence of a showing of surprise that would have hampered presentation of [petitioner's] defense at hearing after the complaint was amended, we find that [petitioner] has suffered no denial of due process." Pet. App. 12a-13a n.3. The Board thus found it unnecessary to address the ALJ's conclusion that petitioner had fraudulently concealed relevant evidence. *Ibid.*[9]

With regard to the merits, the Board adopted the rulings, findings, conclusions and recommended Order of the ALJ. Pet. App. 11a-13a.[10]

3. The court of appeals enforced the Board's order. Pet. App. 1a-7a. The court rejected petitioner's contention that the amendment alleging unlawfulness of the mass layoff was barred by Section 10(b) of the

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[8] In *Redd-I, Inc.*, the Board held that, where the General Counsel seeks to amend a complaint relying on a timely filed charge, the Board will "apply the traditional Board test to determine if the untimely allegation is factually and legally related to the allegations of the timely charge, without regard to whether another charge encompassing the untimely allegation has been withdrawn or dismissed." Slip op. 4.

[9] Chairman Stephens dissented from the Board's holding that the amendment was proper. Pet. App. 13a-15a.

[10] The Board modified the remedy to change the computation of interest. Pet. App. 12a-13a & n.4.

Act. The court noted that Section 10(b) authorizes the Board to amend a complaint at any time. Pet. App. 2a. It further noted that the Board's rule conforms to "the usual rule, codified * * * in Rule 15(c) of the Federal Rules of Civil Procedure * * * that, for purposes of determining whether the statute of limitations has run, an amendment to a complaint relates back to the original complaint if it arises out of the dispute that gave rise to the original complaint." Pet. App. 2a-3a. The court agreed with the Board that the allegation of discriminatory layoffs in the amendment was closely related to the allegations of discriminatory recall in the original complaint. The court pointed out that "the recalls began only four days after the layoffs, and the layoffs and the recalls were the one-two punch in the company's scheme of retaliation." Pet. App. 3a.

The court rejected petitioner's contention that the Board's decision here was contrary to its recent decision in *Ducane*. Quoting the Board's decision in *Redd-I*, the court noted that *Ducane* is limited to " 'an attempt to reinstate the dead allegations themselves without reference to any other pending timely charge.' " Pet. App. 4a. The court disagreed with petitioner that it was unreasonable to distinguish between dismissed charges unrelated to matters charged in the complaint and related charges. The court observed (Pet. App. 5a):

> The only possible significance of the dismissal of a closely related charge is that it might lull a respondent into thinking he didn't have to worry any longer about defending himself against that charge. But this possibility depends on the rule; after *Redd-I* it is plain that he does still have to

worry, provided the dismissed allegations are closely related to the remaining ones. [11]

Addressing the lawfulness of the layoffs, the court concluded that "the evidence that the layoffs and selective recalls were motivated by hostility to the union and its supporters is overwhelming." Pet. App. 6a. The court rejected petitioner's contention that *Wards Cove Packing Co.* v. *Atonio*, 109 S. Ct. 2115 (1989), abrogated the Board's "longstanding rule, endorsed in *NLRB* v. *Transportation Management Corp.*, 462 U.S. 393 (1983), that once the General Counsel shows that hostility to unionization was a factor in a layoff, the company has the burden of persuading the Board that the layoff would have occurred anyway." Pet. App. 6a.

## ARGUMENT

Petitioner raises two contentions: (1) the amendment to the complaint should not have been permitted, and (2) the court and the Board applied an incorrect burden of proof. With respect to both issues, the decision of the court of appeals is correct, and does not conflict with any decision of this Court or of another circuit. Accordingly, review by this Court is not warranted.

1. Petitioner maintains (Pet. 9-19) that the decision to permit amendment of the complaint conflicts with the statute and with decisions of this Court, and is inconsistent with Board precedent. This claim is erroneous.

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[11] The court noted (Pet. App. 5a) that *Redd-I* involved a withdrawn charge, rather than, as here, a dismissed charge, but observed that the Board had applied the principle enunciated in *Redd-I* to cases involving dismissed charges, citing *Stern Entertainment System Inc.*, 290 N.L.R.B. No. 167 (Sept. 23, 1988).

Section 10(b) of the Act provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." 29 U.S.C. 160(b).[12] Section 10(b) also provides that "[a]ny such complaint may be amended by the * * * Board in its discretion at any time prior to the issuance of an order based thereon." The courts of appeals have consistently held that "if additional allegations are closely related or sufficiently related to allegations contained in the charge or original complaint, § 10(b) will not be violated by allowing the complaint to be amended to include additional allegations even though the amendment takes place after the limitation period set forth in § 10(b)." *Rock Hill Tel. Co.* v. *NLRB*, 605 F.2d 139, 142 (4th Cir. 1979).[13] As the court below observed, the "closely related" doctrine is similar to the relation-back provision of Rule 15(c)

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[12] Under the Act, an unfair labor charge "set[s] in motion the machinery of an inquiry. * * * The responsibility of making that inquiry and of framing the issues in the case is one that Congress has imposed upon the Board," through the filing of a complaint. *NLRB* v. *Fant Milling Co.*, 360 U.S. 301, 307 (1959).

[13] Accord: *Eastern Maine Medical Center* v. *NLRB*, 658 F.2d 1, 6 & n.3 (1st Cir. 1981); *NLRB* v. *Inland Empire Meat Co.*, 611 F.2d 1235, 1237-1238 (9th Cir. 1980); *NLRB* v. *Allen's I.G.A. Foodliner*, 651 F.2d 438, 441-442 (6th Cir. 1981); *NLRB* v. *Dinion Coil Co.*, 201 F.2d 484, 491 (2d Cir. 1952). In the context of amendments concerning conduct occurring after the filing of a complaint, this Court has also made clear that Section 10(b) does not preclude the Board from amending a complaint to include related matters not alleged in the underlying charge. *NLRB* v. *Fant Milling Co.*, 360 U.S. at 308-309, reaffirming *National Licorice Co.* v. *NLRB*, 309 U.S. 350, 369 (1940). See also *NLRB* v. *Complas Industries*, 714 F.2d 729, 733 (7th Cir. 1983).

of the Federal Rules of Civil Procedure. Pet. App. 3a.

Contrary to petitioner's contention (Pet. 9-10, 14 & n.10, 16-18), *Local Lodge 1424, Machinists* v. *NLRB*, 362 U.S. 411 (1960), does not suggest that this "closely related" doctrine contravenes the limitations provision of Section 10(b). In *Machinists*, the union and the employer entered into a union security agreement at a time when the union did not represent a majority of the employees; a charge filed more than six months after execution of the agreement alleged that the continued maintenance of the agreement violated the Act. The Court held that the charge was barred by Section 10(b) because the contract could be invalidated only by referring to the union's lack of majority at the time of execution—a circumstance that existed more than six months before the filing of the charge.

The court of appeals' decision clearly does not conflict with the *Machinists* decision. Unlike the situation in *Machinists*, the finding that the mass layoff was an unfair labor practice does not depend upon any event occurring more than six months before the filing of a charge. In this case, a pending, timely filed charge alleged discrimination in recall from the layoff and the amendment to the complaint concerned events that were within six months of the filing of the original charge.[14]

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[14] Petitioner's citation (Pet. 10) to *Lorance* v. *AT&T Technologies, Inc.*, 109 S. Ct. 2261 (1989), is also inapposite. *Lorance* relied on *Machinists* in interpreting the analogous statute of limitations in Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(e)). 109 S. Ct. at 2267-2268. Like *Machinists*, *Lorance* did not involve an amendment of a pending, timely charge to add closely related allegations.

Similarly, contrary to petitioner's assertion (Pet. 16), the decision below is not in conflict with decisions of other courts

As the court of appeals correctly noted (Pet. App. 5a), the fact that another charge embodying the substance of the amendment had previously been dismissed does not require a different result. That the charge had been dismissed bears only on a possible claim of prejudice—*i.e.*, a claim that such dismissal lulled petitioner into thinking that it would no longer have to defend against the layoff charge. Pet. App. 5a. But as the court noted (*ibid.*), petitioner does not argue "lull." [15]

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of appeals. *NLRB* v. *Silver Bakery Inc.*, 351 F.2d 37 (1st Cir. 1965), and *NLRB* v. *Electric Furnace Co.*, 327 F.2d 373 (6th Cir. 1964), involved reinstatement of completely withdrawn charges more than six months after the alleged unfair labor practice, without reference to any pending, timely charge. Nor is there any basis for petitioner's statement (Pet. 16 & n.12) that the decision below "implicitly conflicts" with *NLRB* v. *Wizard Method, Inc.*, 897 F.2d 1233 (2d Cir. 1990). The court there did not "find merit" to the Section 10(b) argument, as petitioner asserts. It held that, while there "might be merit" to the contention, the employer had waived the defense by failing timely to raise it. 897 F.2d at 1236.

Petitioner's additional suggestion (Pet. 14, 17) that the mass layoff allegation was not, in fact, closely related to the charge alleging discriminatory recall of employees from that layoff also raises no issue warranting review. The Board, affirmed by the court below, reasonably found a sufficiently close relationship because the layoffs and recalls were part of the same sequence of events and were closely related in time, and because of the commonality of the evidence showing unlawful motive.

[15] Petitioner does not dispute that, after the amendment, it was given a full opportunity to prepare a defense. Pet. App. 54a. Moreover, at the time the complaint was amended, Board law clearly permitted the amendment. Pet. App. 37a.

Petitioner's suggestion (Pet. 11-18) that the Board's decision is an unjustified and unexplained departure from its decision in *Ducane*, *supra*, is also meritless. As the court of appeals correctly noted (Pet. App. 4a), the Board in *Redd-I* limited *Ducane* to attempts to revive dismissed or withdrawn allegations more than six months after the alleged unfair labor practice, "without reference to any other pending timely charge." Pet. App. 4a, quoting *Redd-I*. Moreover, as the court observed, *Ducane* did not address the "closely related" doctrine and thus provided no basis to conclude that it overruled that doctrine. *Redd-I* simply "ma[de] * * * explicit" the doctrine's continuing applicability. Pet. App. 4a.

The court of appeals (Pet. App. 4a) also properly rejected petitioner's related contention (Pet. 13) that the distinction drawn in *Redd-I* based on the existence of a closely related pending charge is unreasonable. Where one portion of a case has been dismissed but there remains an outstanding timely charge and a complaint based on that charge, the respondent will be proceeding with litigation, and thus reasonably remains liable for other closely related alleged unfair labor practices occurring during the six month period prior to the pending charge. In short, the pending charge puts the respondent on notice that allegations closely related to that charge may be added later, so long as they occurred no more than six months prior to that charge. See *Redd-I*, slip op. 10. By contrast, in the absence of any other pending timely charge, as in *Ducane*, it is reasonable for a respondent to assume that allegations in a dismissed charge cannot be revived outside the Section 10(b) period.

2. Contrary to petitioner's contention (Pet. 19-34), this case presents no issue of substance concern-

ing the allocation of the burden of proof in discrimination cases under the National Labor Relations Act. As the court of appeals found, the evidence supporting the Board's conclusion that antiunion hostility motivated the mass layoff and discriminatory recalls was "overwhelming." Pet. App. 6a.[16] Under the standard approved in *NLRB* v. *Transportation Management Corp.*, 462 U.S. 393, 401 (1983), the Board's General Counsel therefore satisfied his burden of showing that the employee's protected conduct in selecting union representation was a "substantial or motivating factor" in petitioner's layoff decision. Once that showing of unlawful motive had been made, petitioner had the burden of establishing, as an affirmative defense, that there were also legitimate rea-

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[16] The Union's election victory was announced near the end of the workday on a Friday; on Sunday, petitioner telephoned 50 of the 92 unit employees at home and told them not to report for work on Monday (Pet. App. 56a, 80a-81a). Their indefinite layoff was confirmed by letter the following day (Pet. App. 56a). Before the election, petitioner threatened retaliation—including layoffs—if the Union won (Pet. App. 60a, 76a-77a). After the election, supervisors explicitly affirmed petitioner's retaliatory motive for the layoff and its determination not to recall employees who had attended a Union victory celebration, or otherwise demonstrated support for the Union (Pet. App. 63a-67a, 78a-80a). These facts, together with petitioner's other unfair labor practices, including its selections of identified Union supporters for layoff and its discriminatory refusals to recall, fully support the Board's finding of an antiunion motive for the mass layoff (Pet. App. 57a-66a, 75a-76a, 79a-82a, 95a-109a). Petitioner's threats and promises of benefit to discourage Union support (Pet. App. 60a, 62a-64a, 66a, 76a-77a) also belie its suggestion (Pet. ii, 2-3, 22 & nn.16 & 17) that its statements were mere expressions of "views, arguments, or opinion," which could not constitute or be evidence of an unfair labor practice under Section 8(c) of the Act.

sons for its decision, and that those reasons would have caused the employees' layoff and petitioner's selective failures to recall them, irrespective of their protected activity (*id.* at 400-403)—a burden that petitioner was unable to meet (Pet. App. 93a).[17]

As the court of appeals found (Pet. App. 6a), the showing of an unlawful discriminatory motive is precisely what distinguishes the present case from *Wards Cove Packing Co.* v. *Atonio*, 109 S. Ct. 2115 (1989), on which petitioner relies (Pet. 26). That case, which arose under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, did not turn on whether the employer was motivated by a subjective intent to discriminate on a prohibited ground. 109 S. Ct. at 2120 n.4.[18] Rather, *Wards Cove* was litigated as a disparate impact case, where facially neutral business practices were alleged to impose a disproportionate burden on a protected group. In those circumstances, the Court concluded that "the plaintiff bears the burden of disproving an employer's as-

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[17] In concluding that petitioner failed to meet that burden, the Board did not, as petitioner contends (Pet. 24), ignore or fail to give appropriate weight to petitioner's economic justifications. Rather, the Board affirmed (Pet. App. 11a-12a) the findings of its ALJ, who exhaustively considered petitioner's evidence and found it unpersuasive (Pet. App. 82a-94a).

[18] The absence of any showing of unlawful motive—or, indeed, of any issues of unlawful discrimination—makes similarly inapposite petitioner's citation (Pet. 23 n.18, 27 n.20) of *First National Maintenance Corp.* v. *NLRB*, 452 U.S. 666 (1981). In holding that the employer there was not obligated to bargain with the union concerning a partial closing, the Court emphasized that there was no allegation that the employer had acted for antiunion reasons. *Id.* at 682, 687.

sertion that the adverse employment action or practice was based solely on a legitimate neutral consideration." *Id.* at 2126.

By contrast, where an unlawful criterion is shown to have "played a motivating part in an employment decision," the employer may avoid liability under Title VII "only by proving that it would have made the same decision even if it had not allowed [the unlawful criterion] to play such a role." *Price Waterhouse* v. *Hopkins*, 109 S. Ct. 1775, 1787-1788 (1989) (plurality opinion). See also 109 S. Ct. at 1795 (White, J., concurring in the judgment) (after plaintiff establishes an unlawful motive as a "substantial factor," burden of persuasion shifts to employer); *id.* at 1805 (O'Connor, J., concurring in the judgment) (after plaintiff establishes that unlawful motive was substantial factor such that a reasonable factfinder could draw an inference that decision was made because of plaintiff's protected status, burden shifts to employer).[19] In short, the Court applies in Title VII cases a rule analogous to the rule applied in cases under the NLRA where, as here, an unlawful motive for the employer's action is shown. Such a rule was held inapplicable in *Wards Cove* because specific intent to discriminate on an unlawful ground was not an element of the violation alleged there. Accordingly, the court of appeals in the present case properly rejected petitioner's contention that *Wards Cove* "revolutionize[d] labor law" by "abrogat[ing]" the rule approved in *Transportation Management* (Pet. App. 6a-7a).

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[19] Indeed, in *Price Waterhouse*, the Court explicitly relied on the *Transportation Management* analysis. See 109 S. Ct. at 1788, 1790 (plurality opinion); *id.* at 1796 (White J., concurring in the judgment).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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